Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-76

TOPIC, MARGARET ANDERSON, ELEANOR NOWICKI, WILLIAM BOWERS, ELIZABETH BOWERS, WILLIAM FERGUSON, HELEN FERGUSON, MIGUEL SILVA, CARL FARRINGTON, CAMILLE FARRINGTON, PATTY MORTL, MICHAEL MORTL, EDWARD MIDGET and LOUISE MIDGET, individually and on behalf of all others similarly situated, *Petitioners,*

v.

CIRCLE REALTY COMPANY, SPRING REALTY COMPANY, and SHOREWOOD REALTY COMPANY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

CIRCLE REALTY COMPANY, SPRING REALTY COMPANY, and SHOREWOOD REALTY COMPANY, *Respondents.*

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OPINIONS BELOW

The opinion of the District Court for the Central District of California denying respondents' motion to dismiss and certifying the cases for immediate appeal to the Court of Appeals is reported at 377 F.Supp. 111 (C.D. Cal. 1974). The opinion of the Court of Ap-

peals for the Ninth Circuit is reported at 532 F.2d 1273 (9th Cir. 1976). Copies of the two lower court opinions are attached hereto in the Appendix. (A. 1a-14a)

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 23, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether black and white persons who are injured by the racially discriminatory practices of real estate companies have standing to sue under § 812 of Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3612) to challenge such unlawful acts even though they are not the direct objects of the discrimination.

STATUTE INVOLVED

The statute involved is Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* The relevant portions of the statute are set forth in the Appendix. (A. 14a-16a)

STATEMENT OF THE CASE

This petition involves three separate actions brought by petitioners pursuant to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, on March 6, 1974, to eliminate discriminatory practices by respondents in the marketing and sale of housing in the cities of Carson and Torrance, California, and in the unincorporated section of Los Angeles County between Carson and Torrance (hereinafter the "L.A. County strip"). The three actions were brought against Circle Realty Company, Spring Realty Company, and Shorewood Realty Company, respectively.

The complaints in the consolidated cases are nearly identical. The plaintiffs are the same in all three actions, an organization and thirteen private individuals. The organizational plaintiff, "TOPIC" (To Preserve Integrated Community), is an unincorporated association with an interracial membership of approximately 100 families living in the cities of Carson and Torrance, and in the L.A. County strip. The name of the organization—"To Preserve Integrated Community"—denotes one of its purposes, which is to eliminate unlawful discrimination against its members and other persons in the marketing and sale of housing in the Carson-Torrance area.

The named individual plaintiffs are black and white residents of Carson, Torrance, and the L.A. County strip. Margaret Anderson and Eleanor Nowicki are white residents of Torrance. William Bowers, Elizabeth Bowers, William Ferguson and Helen Ferguson, who are black, and Miguel Silva, Camille Farrington and Carl Farrington, who are white, are all residents of Carson. Patty Mortl and Michael Mortl, who are white, and Edward Midget and Louise Midget, who are black, are all residents of the L.A. County strip.

The complaints allege that there is substantial housing segregation in the Carson-Torrance area and that it results in part from the policies and practices of the defendant real estate companies. Plaintiffs further assert that an investigation was conducted from July to November 1973 to determine whether defendants' business practices in the Carson-Torrance area conform to the requirements of Title VIII. The investigation was conducted through the use of "testers," or teams of black and white couples posing as homeseekers and matched so that their housing needs and

ability to pay were for practical purposes identical. The testers visited the offices of the defendants serving the Carson-Torrance area.

Plaintiffs allege that the experiences of the testers reflect the policy and practice of defendants to "steer" non-white homeseekers to housing in minority neighborhoods, and white homeseekers to white residential areas, in violation of Title VIII. For example, whites who requested to be shown housing in Carson were told that they should not buy there because it would soon be all black (Spring, Circle). Representatives of defendant Circle Realty stated that they were no longer selling homes in Carson to whites. In contrast, black homeseekers were encouraged to buy homes in Carson (a city in rapid racial transition), while agents refused to show them homes in Torrance, although homes meeting their specifications were in fact available (Shorewood, Spring).

The plaintiffs brought suit under § 812 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612, "on behalf of all other persons, including present and potential residents of the affected area, who are injured by the policies and practices" alleged in the complaint. The plaintiffs complained that they are injured by defendants' practices "by being deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettos . . . ."

On April 3 and 9, 1974, the defendants moved to dismiss the complaints for lack of standing and for lack of a case or controversy within the meaning of Article

III of the Constitution of the United States. In a May 20, 1974 Memorandum Opinion and Order, the District Court denied defendants' motions, but found that its rulings involved controlling questions of law as to which there is substantial ground for difference of opinion within the meaning of 28 U.S.C. § 1292(b), and certified the rulings for immediate appeal. All proceedings in the District Court were stayed pending appeal. By order dated June 18, 1974, the Court of Appeals for the Ninth Circuit granted defendants' petition for leave to take an interlocutory appeal. On March 23, 1976, the Court of Appeals reversed the District Court, holding that plaintiffs did not have standing to sue under section 3612.[1]

The decision of the Court of Appeals turned solely on the differences in the language of section 3610 and section 3612 of Title VIII (hereinafter "the Act"). The Court held that plaintiffs' actions should have been dismissed because, unlike section 3610, "the language of section 3612 does not authorize lawsuits to vindicate the rights of third parties."[2] (A. 10a) The Court of Appeals said:

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[1] On appeal, the United States, the San Francisco Lawyers' Committee for Urban Affairs (attorneys for the plaintiffs in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)), and the National Committee Against Discrimination in Housing filed separate briefs as *amicus curiae* in support of petitioners' position.

[2] The Court of Appeals noted that one distinction between *Trafficante* and the instant case is that "the plaintiffs here are not residents of a single apartment complex, but rather of a section of metropolitan Los Angeles with a population exceeding 100,000." (A.10a) The Court however, expressly did not rule on the significance of this distinction for purposes of standing. Accordingly, the only issue presented by this petition is whether the Court of Appeals was correct in its narrow interpretation of standing under section 3612.

Section 3610 permits suit by "any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . ." By contrast, section 3612 simply provides that "[t]he rights granted by [section 3604, *inter alia*] may be enforced by civil actions" in federal or state courts.

The Supreme Court has recently characterized its earlier interpretation of section 3610 in *Trafficante* as giving residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth* v. *Seldin, supra,* 422 U.S. at 513. The narrower language of section 3612, on the other hand, precludes suit by such individuals. By permitting suit only to enforce certain enumerated rights, that section provides access to the courts only to those who are granted rights by the Act, namely, those who are the direct objects of the practices it makes unlawful. (A. 11a)

The Court also stated that it viewed its holding as fulfilling the statutory design. Section 3610 permits a "broad spectrum of plaintiffs" to bring suit. However, it requires first that an opportunity be given to the Secretary of Housing and Urban Development to resolve a complaint by informal methods of conference, conciliation and persuasion. Where state law provides rights and remedies substantially equivalent to those provided by federal law, the Secretary must give local authorities an opportunity to resolve the matter. Thereafter suit may be brought in federal court, but only if substantially equivalent remedies are unavailable under state law. Section 3612 on the other hand, has no jurisdictional prerequisites to suit and immediate access to federal court is given those entitled to sue.

Finally, the Court concluded that resting its decision on this narrow construction of section 3612 made it unnecessary to reach the question whether a suit of this kind met the requirements of Article III of the Constitution.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN TRAFFICANTE v. METROPOLITAN LIFE INSURANCE CO., AS WELL AS THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY.

A. The Court of Appeals' Decision Conflicts With This Court's Decision In Trafficante v. Metropolitan Life Insurance Co.

The construction of the Act by the Court of Appeals conflicts with this Court's decision on the same issue in *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972). *Trafficante* was a section 3612 case, as well as a section 3610 case. The original plaintiffs, one white and one black, brought suit pursuant to sections 3610, 3612 and the Civil Rights Act of 1866, 42 U.S.C. § 1982, alleging that the defendants' discriminatory practices caused them injury by interfering with their opportunity for interracial association and with the professional and social benefits of living in an integrated community. A complaint in intervention was filed by other black and white persons and by an unincorporated organization under sections 3612 and 1982.[3] In dismissing the complaint, the District Court held:

> [P]laintiffs and *plaintiffs in intervention* have no such generalized standing as they assert to enforce

[3] Plaintiffs in intervention had not complained to HUD pursuant to section 3610. Hence their only possible basis for standing under the Act was section 3612.

> the policies of the Act. More specifically, they are not "persons aggrieved" under § 810 of the Act, 42 U.S.C. § 3610(a), and therefore may not maintain this suit under § 812, 42 U.S.C. § 3612, or 42 U.S.C. § 1982. *Trafficante* v. *Metropolitan Life Ins. Co.*, 332 F.Supp. 352, 353 (N.D. Calif. 1971) (emphasis added).

On appeal by both plaintiffs and plaintiffs-intervenors, the Court of Appeals identified the question presented under the Act as,

> Are plaintiffs [4] persons aggrieved within the meaning of sections 3610 *and 3612? Trafficante* v. *Metropolitan Life Ins., Co.*, 446 F.2d 1158, 1161 (9th Cir. 1972) (emphasis added).

The Court of Appeals affirmed the District Court's decision essentially on the same grounds.

This Court granted the plaintiffs' petition for writ of certiorari, accepting for review the question whether plaintiffs and plaintiffs in intervention had standing to bring the action under sections 3610, 3612, and 1982. The Court unanimously rejected the reasoning of the courts below, and held that plaintiffs had standing under the Act. Noting that the comparable provision under the equal employment opportunity statute, 42 U.S.C. § 2000e-5(a), shows "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution," the Court ruled:

> With respect to suits brought *under the 1968 Act,* we reach the same conclusion, insofar as tenants of the same housing unit that is charged with discrimination are concerned. 409 U.S. at 209 (emphasis added) (footnote omitted).

[4] In footnote 2 to its opinion, the Court of Appeals explained that "except as otherwise stated, the plaintiffs and plaintiffs in intervention will be referred to collectively as plaintiffs." 446 F.2d at 1160.

While the Court explicitly stated that it was unnecessary to reach the question of standing to sue under section 1982, 409 U.S. at 209, n.8, it held that standing was present to assert all claims under the 1968 Act, which, as we have shown, included claims both under section 3610 and under section 3612. Had this Court intended to leave undecided the claims under section 3612—the *only* claims under the Act which had been asserted by the plaintiffs in intervention—it would have included such a limitation in the footnote which excludes from consideration claims under section 1982. Moreover, the paragraph of the Court's opinion which accords broad standing under the 1968 Act immediately follows a discussion of the various enforcement mechanisms under the Act, including specifically private litigation under section 3612.

The reasoning which underlies the Supreme Court's decision applies in all respects to suits brought under section 3612, as well as to those under section 3610. This Court's concern in *Trafficante* was with "vindicating" the policy of Title VIII, a policy which, the Court noted quoting the Solicitor General, is one "that Congress considered to be of the highest priority." 409 U.S. at 211. In order to effectuate that policy, this Court accorded standing to the *Trafficante* plaintiffs who, like the plaintiffs in the instant case, were injured by the alleged discriminatory practices even though they were not the direct objects of the discrimination.

In so ruling, this Court analyzed the various enforcement mechanisms available under Title VIII. The Court first noted that "HUD has no power of enforce-

ment." 409 U.S. at 210. "So far as federal agencies are concerned," the Court also observed, "only the Attorney General may sue." *Id.* The Court added, however, that, for the most part, fair housing litigation conducted by the Attorney General is handled by the staff of one section of one division of the Department of Justice. 409 U.S. at 211. In light of "the enormity of the task of assuring fair housing," the Court accurately characterized the Attorney General's role as "minimal." *Id.* The Court concluded that "the main generating force must be private suits in which the . . . complainants act not only on their own behalf but also as private attorneys general . . . ." *Id.*

This Court drew no distinction between private suits filed under section 3610 and those filed under 3612. Indeed, if, as this Court agreed, private litigation is to be the principal means of "vindicating" the policy of Title VIII, it cannot be accomplished by a restrictive reading of the one section of that law which deals solely with private litigation. The fact that the claims of some of the complainants in *Trafficante* arose solely out of section 3612, further reinforces the view that the Court intended no such restrictive reading.[5]

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[5] Prior to the decision of the Court of Appeals in this case, *Trafficante* had been interpreted uniformly by the lower courts to permit an action such as the instant one to be brought in reliance on section 3612. *See*, e.g., *Village of Park Forest* v. *Fairfax Realty Co.*, P.H.E.O.H. Rptr. ¶ 13,699 (N.D. Ill. 1975); *Heights Community Congress* v. *Rosenblatt Realty Co.*, P.H.E.O.H. Rptr. ¶ 13,702 (N.D. Ohio 1975); *Cornelius* v. *City of Parma*, 374 F. Supp. 730, 741 (N.D. Ohio), *vacated on other grounds*, 506 F.2d 1400 (6th Cir. 1974), *vacated for further consideration*, 422 U.S. 1052 (1975), *dismissal ordered*, 521 F.2d 1401 (6th Cir. 1975); *cert. denied*, 96 S. Ct. 1430 (1976); *see also Fort* v. *White*, 383 F.Supp. 949, 953 (D. Conn. 1974) (Section 3612 not to be read narrowly in view of Supreme Court's "extraordinarily broad view of the scope of the remedies and standing authorized by the 1968 Act.")

B. The Court of Appeals' Restrictive View of Standing Under Section 3612 Conflicts With The Statutory Language And The Legislative History of the Act.

The Court of Appeals conceded (as it was obliged to) that under section 3610 private persons injured by a discriminatory practice had standing to sue, even though they were not the direct objects of the discrimination. The Court held, however, that "the language of section 3612 does not authorize lawsuits to vindicate the rights of third parties." (A.10a)

Plaintiffs point out, first, that the rights they seek to vindicate are not merely those of third parties, but their own. The injury they seek to redress through this action is to themselves, not merely to those who are the direct objects of the alleged discrimination. As this Court stressed in *Trafficante:*

> The person on the landlord's blacklist is not the only victim of discriminatory practices; it is, as Senator Javits said in supporting the bill, "the whole community." 409 U.S. at 211.

Second, the Court of Appeals' narrow reading of section 3612 finds no support either in the language of that statutory provision or in the legislative history of the Act. Section 3612 provides in relevant part: "The rights granted by sections 3603, 3604, 3605, and 3606 may be enforced by civil actions . . . ." There is no question that the discriminatory practices alleged by the petitioners constitute a clear violation of section 3604. These practices are plainly proscribed by the language of that section. Regardless of the persons who are the direct objects of these discriminatory practices, the practices themselves constitute a violation.

Further, contrary to the Court of Appeals' assertion, the language of section 3612 does not, either by its terms or by implication, restrict the right to enforce the prohibitions of Title VIII solely to those who are the direct objects of the discrimination. In fact, section 3612 contains no special restrictions as to who may enforce the rights secured by Title VIII. Thus the only restrictions are those imposed by Article III. As this Court stressed in *Trafficante,* Congress, in enacting Title VIII, intended to "define standing as broadly as is permitted by Article III of the Constitution." 409 U.S. at 209. And as in *Trafficante,* the dispute in the instant case "is presented in an adversary context . . . . Injury is alleged with particularity, so there is not present the abstract question raising problems under Article III of the Constitution." 409 U.S. at 211.

In addition, in light of this Court's recognition that private suits must be "the main generating force," its admonition that section 3610(a) be given a "generous construction," 409 U.S. at 212, must apply with equal force to section 3612, the one section of Title VIII that deals solely with private litigation. Thus the Court of Appeals' restrictive interpretation of standing under section 3612 finds no support in the language of that section and, indeed, is in direct conflict with this Court's view of the "generous construction" to be accorded Title VIII.

Nor does the Court of Appeals' restrictive view of section 3612 find any support in the legislative history of the Act. Indeed, the legislative history directly refutes the lower court's interpretation. All of the pertinent discussion indicates that section 3610 which, the Court of Appeals conceded, carries broad standing

criteria, and section 3612, were intended to provide alternative and co-equal methods of enforcement.

As this Court noted in *Trafficante,*[6] section 3610 was derived from an amendment offered by Senator Mondale and incorporated in the bill offered by Senator Dirksen which was eventually passed by the House and Senate. Section 3612 was derived from the Dirksen substitute itself,[7] and the key language was unchanged as enacted by Congress. Senator Kuchel entered into the Congressional Record an explanation of the Dirksen substitute prepared by the Department of Justice at the request of the sponsors of the Dirksen bill.[8] That explanation makes clear that section 3612 was intended by the authors of the provision merely to provide a method of enforcement additional or alternative to that available under section 3610. Moreover, there is no suggestion that section 3612 was to provide relief to a class of persons narrower than that protected by section 3610.

The explanation stated in pertinent part:

> *In addition to the administrative remedy provided through the Department of Housing and Urban Development,* the bill provides for an immediate right to proceed by civil action in an appropriate Federal or State court. 114 Cong. Rec. at 4908 (emphasis added).

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[6] 409 U.S. at 210, n.9.

[7] 114 Cong. Rec. at 4573 (Section 212 of the Dirksen substitute) Section 212(a) provided in pertinent part:

> The rights granted by sections 203, 204, 205, and 206 may be enforced by civil actions in appropriate United States District Courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

[8] 114 Cong. Rec. 4906-4908.

Likewise, in the House during the debate on the Dirksen bill passed by the Senate, then Congressman Ford, a supporter of the bill, introduced into the Record a staff memorandum prepared by the House Committee on the Judiciary. The memorandum described section 3612 as a co-equal alternative to the procedure under section 3610. 114 Cong. Rec. 9612.

Similarly Congressman Celler, another spokesman in the House for the Dirksen bill, stated that the bill provided " . . . three methods of obtaining compliance: administrative conciliation, private suits and suits by the Attorney General for a pattern or practice of discrimination." 114 Cong. Rec. 9560, 9561.

Thus, the legislative history of sections 3610 and 3612 fails to corroborate in any way the distinctions drawn between the two provisions by the Court of Appeals. On the contrary, the legislative debate directly confirms the contentions of petitioners that the classes of persons entitled to proceed under the two sections are identical, and that the two sections are merely alternative means of enforcing the same rights.[9]

CONCLUSION

Because the decision of the Court of Appeals, precluding standing under section 3612 of Title VIII for persons injured by discriminatory housing practices, is inconsistent with this Court's prior decision in *Traf-*

[9] The lower courts that have addressed the issue have found uniformly that sections 3610 and 3612 provide alternative remedies to housing discrimination. *Marr* v. *Rife*, 503 F.2d 735, 739 (6th Cir. 1974); *Warner* v. *Perrino*, P.H.E.O.H. ¶ 13,717 (N.D. Ohio 1975); *Crim* v. *Glover*, 338 F.Supp. 823 (S.D. Ohio 1972); *Johnson* v. *Decker*, 333 F.Supp. 88 (N.D. Cal. 1971); *Brown* v. *LoDuca*, 307 F.Supp. 102 (E.D. Wis. 1969).

ficante, as well as with the statutory language and legislative history of the Act, the Petition for a Writ of Certiorari should be granted and the case brought here for review.

Respectfully submitted,

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July 19, 1976

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

Nos. CV-74-591-JWC, CV-74-592-JWC, CV-74-594-JWC

TOPIC et al., *Plaintiffs,*

v.

CIRCLE REALTY COMPANY, *Defendant.*

TOPIC et al., *Plaintiffs,*

v.

SPRING REALTY COMPANY, *Defendant.*

TOPIC et al., *Plaintiffs,*

v.

SHOREWOOD REALTY COMPANY, *Defendant.*

May 20, 1974.

Memorandum Opinion

CURTIS, *District Judge.*

The plaintiffs have filed three almost identical Civil Rights actions seeking to enjoin the defendants, (real estate firms) from engaging in alleged discriminatory practices in violation of the Fair Housing Act of 1968, more correctly called the "Civil Rights Act of 1968," Title VIII, 42 U.S.C. § 3601 et seq.

Jurisdiction is invoked under 28 U.S.C. § 1343(4) and 42 U.S.C. § 3612 to remedy alleged violations of 42 U.S.C. § 3604. Plaintiffs also allege a claim under the 1866 Civil Rights Act, 42 U.S.C. § 1982.

Motions to dismiss have been filed on the part of all defendants, and since precisely the same questions of law are

raised in each case, the motions were heard together and the court renders this single opinion which is equally applicable to all three cases.

It is alleged in the plaintiffs' complaint that the plaintiff, TOPIC, is an unincorporated association formed October 4, 1972, its purpose being "To Preserve an Integrated Community", from which the name TOPIC is derived. The complaint further alleges:

> "TOPIC is an interracial, volunteer organization with approximately 100 member families living in the cities of Torrance and Carson, California, and in the unincorporated section of Los Angeles County between the cities of Carson and Torrance (hereinafter the 'L.A. County strip'). One of the purposes of TOPIC is to eliminate unlawful racial discrimination against its members and against other persons in the marketing and sale of housing in the cities of Torrance and Carson, and in the L. A. County strip. TOPIC seeks to assure to its members the right to the important social and professional benefits of interracial associations that arise from living in an integrated community."

The individual plaintiffs, some of whom are black and some of whom are white, reside within the community embracing the Torrance, Carson and L. A. County strip area. From July to November 1973, TOPIC conducted an investigation to determine whether the policies and practices of real estate firms doing business in that area were in compliance with the Civil Rights Act of 1866 and the Civil Rights Act of 1968. The investigation focused on whether these real estate firms were engaged in "racial steering", which plaintiffs characterize as the "practice of directing non-white homeseekers to housing in designated minority residential areas," a practice prohibited by the Civil Rights Act of 1968.

The investigation was conducted by the use of teams of black and white couples posing as homeseekers, whose

housing needs and financial ability were for all intents and purposes about equal. These testing teams visited some 17 realty companies, including the defendants.

The complaint then describes a number of specific encounters between the members of the testing teams and the agents of the real estate firms, which conduct plaintiffs allege is a "part of the company's continuing policies and practices to limit, classify, segregate, and otherwise discriminate on the ground of race in the sale of housing."

The plaintiffs contend they are injured by these practices "by being deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettos . . . ."

Although it may well be argued that some of the conduct as alleged does not violate the Acts, for the purposes of this motion, only, I will accept plaintiffs' characterization of defendants' practices as that of "racial steering" such as is prohibited.

The threshold question is: Do these plaintiffs have standing to maintain this action? The defendants contend that they do not since the alleged steering was not practiced upon the plaintiffs. If it occurred at all, defendants argue, it occurred with respect to testing teams who are not in reality homeseekers or purchasers. Defendants argue there has been no individual injury alleged. Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The plaintiffs, however, rely on the recent case of Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). In this case, two tenants in Parkmerced, an apartment complex in San Francisco, brought an action against the landlord, charging discrim-

inatory practices against nonwhite rental applicants. Such practices included making it known to them that they would not be welcome at Parkmerced, manipulating a waiting list for apartments, delaying action on their applications, using discriminatory acceptance standards and the like. The tenants claimed that they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business and professional activities from being stigmatized as residents of a white ghetto. The District Court held that the tenants were not within the class of persons entitled to sue under the Act. 322 F.Supp. 352. The Court of Appeals affirmed, construing 42 U.S.C. § 3610(a) narrowly to permit complaints only by persons who were the objects of discriminatory housing practices. 9 Cir., 446 F.2d 1158. The Supreme Court, however, reversed, holding that the tenants had a right to sue. The Court pointed out that § 3610(a) extends the right to sue to "[a]ny person who claims to have been injured by a discriminatory housing practice" and that such language showed a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.[1] Congress further recognized that "[w]hile members of minority groups were damaged the most from discrimination in housing practices . . . those who were not the direct objects of discrimina-

[1] In Hackett v. McGuire Brothers, Inc., 445 F.2d 442 (3rd Cir. 1971) the court allowed a suit to be started by "a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a) concluding that the words used showed "[A] congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* 446. The Supreme Court in the *Trafficante* case reached the same conclusion with respect to plaintiffs in a suit brought under the Civil Rights Act of 1968 insofar as they are tenants of the same housing unit that is charged with discrimination.

tion had an interest in ensuring fair housing, as they too suffered."[2]

The Court also noted:

> "The language of the Act is broad and inclusive. Individual injury or injury in fact to petitioners, the ingredient found missing in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, is alleged here. What the proof may be is one thing; the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations."

The Supreme Court's logic appears to apply with equal force and relevance to the facts before this court, and I would have no hesitancy in applying it here were it not for the clear indication that the Court in *Trafficante* was extending standing to sue only to tenants of a housing project complaining of discriminatory practices of the management. The Court's language presupposes some outer limits to the rule enunciated, but the situations in the two cases are so similar there seems to be no just reason for setting such limits short of the facts of the case before this court.

It is, of course, true that the apartment complex with which the Supreme Court was dealing had a resident population of approximately 8,200 residents, whereas the Torrance-Carson community has a population of something over 100,000. Its residents, however, live in a closely settled area.[3] Those residing in this community buy from the same stores, attend the same churches, send their chil-

[2] See Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on S.1358, S.2114, and S.2280, 90th Cong., 1st Sess. (1967).

[3] Although the record makes no reference to the population or area of the Torrance-Carson community, the court takes judicial notice of these facts.

dren to the same schools. They are served by the same recreational facilities and enjoy the same cultural opportunities. If any of the 8,200 residents of an apartment complex can be injured by virtue of the loss of important benefits from interracial associations surely the residents of the Carson-Torrance community can and do suffer similar deprivations.

One further question remains. Since the testers were not, in fact, real purchasers and therefore any steering as to them would cause no effect, whatever, upon the racial balance of the community, do these cases, in fact, involve actual controversies in the constitutional sense?[4]

Section 3604 of Title 42 prohibits certain discriminatory practices without regard to their actual effect upon the community. So when a plaintiff alleges that the defendants have engaged in a prohibited discriminatory practice, all that is needed to support an injunction is proof that the practice exists. The Supreme Court in *Trafficante* pointed out that the Act contemplated its enforcement not only by the Attorney General, but also by aggrieved persons acting as "private attorneys general." This practice, the Court continues,

> "[S]erves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against

[4] Unless a case or controversy exists, Article III of the Constitution precludes the exercise of judicial power. North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). To be justiciable, a controversy " '[M]ust be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' Aetna Life Ins. Co. v. Saworth, 300 U.S. 227, 240-241 [57 S.Ct. 461, 464, 81 L.Ed. 617] (1937)." *See also* Isaacs Brothers Company v. Hibernia Bank, 481 F.2d 1168, 1170 (9th Cir. 1973).

> whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives.' Shannon v. United States Dept. of Housing & Urban Dev., 436 F.2d 809, 818 (CA3)." *Id.* 211.[5]

For the foregoing reasons, the defendants' motions to dismiss in all cases are denied.

This court is of the opinion that the order denying the defendants' motions to dismiss involves a controlling question of law as to which there is substantial grounds for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. These cases are therefore certified for immediate appeal and all proceedings herein shall be stayed pending such appeal.

[5] In *Trafficante* the plaintiffs were proceeding under Title 42 U.S.C. § 3610(d), where as the plaintiffs in the case before us are proceeding under 42 U.S.C. § 3612. This distinction is irrelevant for it seems clear that the congressional intention was to define the right to sue under § 3612 at least as broadly as under § 3610(d).

The plaintiffs, here, also seek relief in count II pursuant to the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1982. The District Court in the *Trafficante* case dismissed a similar count on the ground that there was no standing and the Circuit Court affirmed. The Supreme Court did not reach this question and consequently did not reverse this decision. Upon the authority, therefore, of the Circuit Court's opinion, I would hold that the plaintiffs have no standing to sue under the provisions of § 1982.

TOPIC *et al., Appellees,*

v.

CIRCLE REALTY *et al., Appellants.*

No. 74-2147.

United States Court of Appeals,
Ninth Circuit.

March 23, 1976

* * * * * * * * * *

Opinion

Before CHAMBERS, TRASK and KENNEDY, *Circuit Judges.*

ANTHONY M. KENNEDY, *Circuit Judge:*

This is an interlocutory appeal from the district court's refusal to dismiss actions to enjoin three Los Angeles real estate brokers from alleged violations of the Fair Housing Act of 1968, 42 U.S.C. § 3604, and the Civil Rights Act of 1866, 42 U.S.C. § 1982.[1] Jurisdiction in the district court was based on the Fair Housing Act, 42 U.S.C. § 3612, and on 28 U.S.C. § 1343(4). The plaintiffs are TOPIC,[2] an unincorporated association, and three individual members. The district court denied the motion to dismiss, holding that plaintiffs had standing to sue under the Fair Housing Act.[3]

TOPIC is an organization of approximately one hundred families, both black and white, living in the cities of

[1] The district court properly certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). On June 18, 1974, a panel of this court granted appellants' petition for interlocutory appeal.

[2] The name of the organization is derived from the phrase, "to preserve an integrated community."

[3] The opinion below is reported at 377 F.Supp. 111 (C.D.Cal. 1974).

Torrance and Carson, California, and in the unincorporated portion of Los Angeles County which lies between those cities. The declared purpose of TOPIC is to combat racial discrimination and eliminate race as a factor in the marketing of housing for the geographical area where its members reside.

During 1973 TOPIC used teams of black couples and white couples posing as home seekers to investigate the business practices of real estate brokers in Torrance and Carson. Based on this investigation TOPIC concluded that the defendant real estate brokers engage in "racial steering," defined in the complaints as the practice of "directing non-white home seekers to housing in designated minority residential areas, and directing white home seekers to housing in designated white residential areas." These actions charge that such steering violates the Fair Housing Act, 42 U.S.C. § 3604(a), (b) and (d).[4] None of the plaintiffs were actual homeseekers subjected to racial steering; rather, these plaintiffs alleged that they are injured by the defendants' activities in that they are:

> being deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes . . .

[4] Each complaint alleged a cause of action under 42 U.S.C. § 1982. The court below correctly noted that the law of this circuit established in *Trafficante* v. *Metropolitan Life Insurance Co.*, 446 F.2d 1158, 1163-64 (9th Cir. 1971) and left undisturbed by the Supreme Court's reversal on other grounds, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), required the dismissal of the counts based on § 1982, 377 F.Supp. at 115 n. 5. The order of the court, however, fails expressly to dismiss that count. From reading the court's opinion in its entirety it is clear that the language of footnote 5 was intended as a dismissal of the counts based on § 1982, and that portion of the order is hereby affirmed.

As a general rule, litigants do not have standing to assert the rights of third parties who may have been injured by unlawful conduct. However, a statute may accord such standing to a "private attorney general," as long as the unlawful conduct has also caused him injury-in-fact sufficient to satisfy the case or controversy requirement of article III. Here the injury alleged by TOPIC and its members is similar to that in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 208, 93 S.Ct. 364, 366, 34 L.Ed.2d 415, 418 (1972). There the Supreme Court held that the Fair Housing Act in 42 U.S.C. § 3610, conferred standing broadly enough to include tenants of a large apartment complex challenging their landlord's alleged discrimination in the rental of apartments. The Court's conclusion was based on the purpose and structure of the Act, and the expansive definition of "person aggrieved" in section 3610.

There are, however, two significant distinctions between the instant case and *Trafficante*. First, the plaintiffs here are not residents of a single apartment complex, but rather of a section of metropolitan Los Angeles with a population exceeding 100,000. Therefore, the role played by defendants' alleged racial steering in denying the plaintiffs the benefits of living in an integrated community may be so attenuated as to negate the existence of any injury in fact. It is quite possible that, even absent the defendants' discriminatory practices, Carson and Torrance would still be segregated communities. *See Warth* v. *Seldin*, 422 U.S. 490, 504-08, 95 S.Ct. 2197, 2208-10, 45 L.Ed.2d 343, 358-60 (1975).

However, we need not reach this constitutional issue because of the second distinction with *Trafficante*. This action was brought under section 3612 rather than section 3610. We hold that the language of section 3612 does not authorize lawsuits to vindicate the rights of third parties. The plaintiffs therefore failed to state a claim for which

relief could be granted under the jurisdictional section invoked, and the district court should have dismissed the action on that ground.

Section 3610 permits suit by "any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . .." By contrast, section 3612 simply provides that "[t]he rights granted by [section 3604, *inter alia*] may be enforced by civil actions" in federal or state courts.

The Supreme Court has recently characterized its earlier interpretation of section 3610 in *Trafficante* as giving residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth* v. *Seldin, supra*, 422 U.S. at 513, 95 S.Ct. at 2212, 45 L.Ed.2d at 363. The narrower language of section 3612, on the other hand, precludes suit by such individuals. By permitting suit only to enforce certain enumerated rights, that section provides access to the courts only to those who are granted rights by the Act, namely, those who are the direct objects of the practices it makes unlawful.

Section 3604 grants rights not to be discriminated against in the sale or rental of housing. The plaintiffs in the instant case were already homeowners or renters; they did not make bona fide efforts to buy or rent housing. *Cf. Pegues* v. *Bakane*, 445 F.2d 1140, 1142 (5th Cir. 1971) (section 3612 held inapplicable because plaintiff failed to make actual offer to purchase property). Although the complaint alleges that racial steering is a practice which violates section 3604, we conclude that only the direct victims of such a practice have a cause of action under section 3612.

Our conclusion is consistent with the statutory design. Sections 3610 and 3612 provide complementary enforce-

ment procedures under the Fair Housing Act. Section 3610 permits suit by a broad spectrum of potential plaintiffs, but requires compliance with certain preliminary procedures before redress may be sought in federal court. Persons aggrieved by discriminatory housing practices must, under section 3610, file a complaint with the Secretary of Housing and Urban Development, who may take up to 30 days to investigate it and determine whether to resolve it administratively The Secretary may seek to eliminate or correct the alleged discriminatory practice by informal methods of conference, conciliation and persuasion. Where state or local fair housing legislation provides rights and remedies substantially equivalent to the rights and remedies provided by federal law, the Secretary is directed to give the local authorities first opportunity to resolve the matter. In either event no suit may be brought for an additional thirty days while the conciliation process is taking place. Even then no action may be brought in federal district court if substantially equivalent remedies may be obtained under state law.

By contrast to the above, section 3612 has no pre-conditions to suit. Those entitled to bring an action under this section have immediate access to a federal forum.

This comparison demonstrates the functions served by the distinct jurisdictional grant of each section. Section 3610 contemplates the resolution of disputes in the slower, less adversary context of administrative reconciliation and mediation. While this section provides a remedy for a broad spectrum of individuals aggrieved by discrimination, the judicial system is not the initial forum for relief and thus is protected from a potential excess of litigation. Section 3612 provides preferential access to judicial processes as necessary for those individuals who are the primary victims of the illegal acts of discrimination. Such persons are likely to suffer grave and immediate harm and judicial relief may be necessary for the full vindication of

their rights. *See* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968,* 82 Harv.L.Rev. 834, 857 (1969). Section 3614, which requires expedited procedures for cases brought under section 3612, but not those brought under section 3610, supports this conclusion.

To accept plaintiffs' argument that sections 3610 and 3612 extend to identical classes of plaintiffs would destroy this statutory pattern, for the procedural prerequisites of section 3610 could then be avoided in every case. The congressional purpose is illustrated by the present case. The injuries TOPIC's members may have suffered from living in segregated communities were caused by no specific single act of the defendants, but by a prolonged practice spanning many years. An injunction, if granted, would stop the practice of racial steering by the defendants, but the desired result of establishing an integrated community would not be achieved immediately. In this context, conciliation at the agency level might not only be an adequate, but a superior, remedy. Moreover, a delay in plaintiffs' access to court would not significantly worsen plaintiffs' injuries, if at all. In sharp contrast is the denial of access to one seeking to rent or purchase housing, where inability to obtain an immediate judicial remedy may constitute a serious hardship.

Finding, as we do, that section 3612 does not create a cause of action for the injury herein alleged permits us to avoid exploring the outer limits of our constitutional power under article III, a difficult and as yet not fully resolved area of the law. While such an inquiry may be unavoidable in a similar suit brought under section 3610 (and we intimate no view of the proper resolution of such case), our interpretation of section 3612 reserves this difficult constitutional question for a case where the issues have more sharply focused by, *inter alia,* prior action on the administrative level. Accordingly, we conclude that plain-

tiffs have failed to state a claim upon which relief could be granted under section 3612. This case is remanded to the district court for dismissal of the complaint.

REVERSED AND REMANDED.

The relevant provisions of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.*, are as follows:

Section 3604

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.
>
> . . . .
>
> (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Section 3610

> (a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall

> contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. . . .
>
> . . . .
>
> (d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: Provided, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged

to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

Section 3612

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.